No. 75913-2-I

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION I

FEDERAL HOME LOAN BANK OF SEATTLE,
a bank created by federal law,

Appellant,

v.

BARCLAYS CAPITAL, INC., a Connecticut corporation; BCAP LLC, a Delaware limited liability company; and BARCLAYS BANK PLC, a public limited company registered in England and Wales,

Respondents.

APPELLANT'S REPLY BRIEF

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"[C]onsidering the evidence and all reasonable inferences from the evidence in the light most favorable to [Seattle Bank,]"[1] Barclays falls far short of proving that there is no genuine issue as to even a single material fact about whether it was reasonable for Seattle Bank to rely on the statements that Barclays made in its offering documents for IND1 and IND2. And Barclays offers no persuasive reason why the Washington Supreme Court, which has always interpreted the WSSA to protect investors, would ally itself with the lower courts in a small minority of states that have read an anti-investor reliance requirement into their securities laws. Indeed, in both branches of its argument, Barclays often just ignores the arguments that Seattle Bank made in its opening brief; when Barclays tries to respond to those arguments, it does so unconvincingly.

I. BARCLAYS DOES NOT DISPEL THE GENUINE ISSUES AS TO MANY MATERIAL FACTS THAT SEATTLE BANK ADDUCED IN ITS OPENING BRIEF.

A. Genuine Issues About Information Available To Seattle Bank

1. Public Reports

Barclays just ignores the reasons that Seattle Bank gave in its opening brief why there are genuine issues as to material facts about

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[1] *Fortgang v. Woodland Park Zoo*, 187 Wn.2d 509, 518 (2017) (internal quotation marks omitted).

whether information available to the public made it unreasonable for Seattle Bank to rely on the statements that Barclays made in the offering documents for IND1 and IND2:

- Barclays cites no information, public or otherwise, about the 1,643 mortgage loans that backed IND1 and IND2 and about which Barclays made untrue or misleading statements;
- Barclays does not cite even a single report that lenders in general (much less IndyMac in particular) were making mortgage loans that did not comply with their underwriting guidelines. Nor does Barclays dispute that many courts have held that relaxing underwriting guidelines is quite different from making loans that do not comply with guidelines;[2] and
- None of the reports that Barclays cites says a word about appraisals not being made in accordance with the Uniform Standards of Professional Appraisal Practice.

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[2] *See, e.g., Nat'l Credit Union Admin. Bd. v. UBS Secs., LLC*, No. 12-2591-JWL, 2017 WL 411338, at *2 (D. Kan. Jan. 31, 2017) (general knowledge about "loosening underwriting standards . . . does not support a reasonable finding that [the plaintiffs] actually knew that these specific loans were not originated in compliance with the guidelines."); *Fed. Hous. Fin. Agency v. Nomura Holding Am., Inc.*, 104 F. Supp. 3d 441, 564 (S.D.N.Y. 2015) (disclosures about "relaxed underwriting standards" are not notice that originators "failed to adhere to their underwriting guidelines."); *In re IndyMac Mortg.-Backed Secs. Litig.*, 718 F. Supp. 2d 495, 509 (S.D.N.Y. 2010) ("Disclosures regarding the risks stemming from the allegedly abandoned standards do not adequately warn of the risk the standards will be ignored.").

With the benefit of hindsight and the diligent work of its lawyers, Barclays has picked out a handful of press reports from among the tens of thousands of such reports about the mortgage market in 2007 and early 2008. It argues that Seattle Bank, when trying to keep abreast of events as they were happening rather than looking back on those events years later, should likewise have focused on those few articles and disregarded the many others that were equivocal or contradictory. This kind of post-facto cherry-picking is not a basis for summary judgment.[3]

2. Access To Loan Files

Joel Adamo of Seattle Bank and his boss, Vincent Beatty, both testified that, even though Seattle Bank bought dozens of mortgage-backed securities, it did not have access to the files on the mortgage loans that backed any of those securities.[4] Because Seattle Bank did not have

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[3] *See, e.g., JP Morgan Chase Bank v. Winnick*, 350 F. Supp. 2d 393, 410–13 (S.D.N.Y. 2004) (material issues of fact precluded summary judgment on issue of reasonable reliance, despite investor's sophistication, where analysts' views on company were mixed, company issued reassurances, it was unclear that if plaintiff had launched an investigation, it could have discovered the fraud, and defendants continued to dispute that there was any fraud to discover); *In re Nat'l Century Fin. Enters., Inc.*, 846 F. Supp. 2d 828, 880–82 (S.D. Ohio 2012) (reasonable jury could find that sophisticated investors reasonably relied on statements in private offering materials where defendant had access to information not available to them, defendant made specific representations about the potential investment, and there was no indication that an investigation would have actually discovered the fraud).

[4] Adamo testified that he "never saw the loan files" (CP 4294) and that he "spent a long time trying to get loan files from different sponsors and issuers, but I did

those files, it had no way of knowing that many mortgage loans that backed IND1 and IND2 were not made in accordance with IndyMac's underwriting guidelines and that many appraisals of the mortgaged properties were not made in accordance with the Uniform Standards of Professional Appraisal Practice. Barclays, on the other hand, had access to those loan files and took samples of them for its vaunted due diligence process.[5]

Barclays disputes none of this. Instead, Barclays argues that Seattle Bank never asked it or IndyMac for loan files. But Barclays stops short of saying that, if Seattle Bank had asked, then Barclays would have given it access to loan files. Neither Barclays nor any other underwriter of RMBS had given Seattle Bank access to loan files in the past.

B. Genuine Issues About Barclays's Direction To, And Inducement Of, Seattle Bank To Rely On Its Statements About IND1 And IND2

Seattle Bank noted that Barclays directed investors in IND1 and IND2 to rely on its prospectus supplements, and only its prospectus

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not get access to those loan files" (CP 4308). Beatty testified that "[t]hose [loan files] were not generally available to us." CP 4320.

[5] Barclays claims to have done a "comprehensive review of individual loan files" for loans that it securitized. CP 4582. It reviewed a sample of 10-25% of the loan files to identify "[e]xceptions to sellers underwriting guidelines, [l]ayered risk, and [u]nacceptable risk factors that are unique to Barclays." *Id.* Barclays also reviewed all of the appraisals for the loans and reviewed the loan files to make sure they complied with federal and state law. *Id.*

supplements, in deciding whether to purchase securities in those offerings.[6] Barclays meets this point with the completely unsupported statement that that direction did not mean what it said, but rather was intended "to protect *issuers and underwriters* from liability for statements made by others."[7]

Seattle Bank also argued that Barclays induced it to rely on statements in the prospectus supplements by touting the extensive due diligence investigation that Barclays undertook to make sure that its prospectus supplements contained no untrue or misleading statements.[8] Barclays says that the presentation it gave Seattle Bank about its exhaustive due diligence "had nothing to do with the IND1 and IND2 transactions."[9] Barclays is wrong. The presentation was entitled "Introduction to Barclays Prime/Alt-A Shelf: BCAP."[10] A "shelf" is a facility that an issuer of securities establishes with the Securities and Exchange Commission to enable it to issue in the future a sequence of similar securities. Both IND1 and IND2 were issued from Barclays's

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[6] Seattle Bank Op. Br. at 12-13.

[7] Barclays Br. at 48 (emphasis in original).

[8] Seattle Bank Op. Br. at 13–14.

[9] Barclays Br. at 48.

[10] CP 4573.

"BCAP" shelf; indeed, the full names of those transactions were BCAP 2008-IND1 and BCAP 2008-IND2.

Barclays is also wrong that "this argument directly contradicts [Seattle Bank's] contention that it did not rely on any information outside of the prospectus supplements."[11] Even if Seattle Bank had made that contention, one reason why it felt comfortable in relying on the prospectus supplements (and why its reliance on them was reasonable) was that the two transactions were from the BCAP shelf, and Barclays had assured Seattle Bank that it was very careful to ensure that prospectus supplements from the BCAP shelf were thoroughly investigated and free of untrue or misleading statements.[12]

C. Genuine Issues As To Material Facts About Seattle Bank's Role In IND1 And IND2

1. Issues About The Origin Of IND1 And IND2

Barclays argues that "[t]he IND1 securitization was conceived during a late-2007 holiday ski trip by Joel Adamo [of Seattle Bank] and

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[11] Barclays Br. at 48.

[12] *See* Seattle Bank Op. Br. at 12–14. In the presentation on the BCAP shelf, Barclays stated "[p]rior to purchasing loans, Barclays will perform a thorough credit and operational on-site due diligence review of each seller, focusing on" six aspects of the seller's policies and operations. CP 4579. One of those sellers was IndyMac. CP 4580. Barclays also touted the due diligence results of the loans underlying the BCAP security it had already sold to Seattle Bank, BCAP 2007-AA2 (CP 4587), and the performance of loans in earlier BCAP securitizations (CP 4588-4591).

his longtime friend, Reed Newkirk of IndyMac."[13] But the only evidence that Barclays cites says nothing about "conceiving" IND1, nor does it even mention Barclays; that evidence proves only that Adamo told Newkirk that Seattle Bank might be able to purchase an RMBS backed by IndyMac mortgage loans if the RMBS were issued by a securities firm on Seattle Bank's approved list.[14] Nor is it true that "Newkirk and Adamo undertook a search for potential third-party banks from which to rent a shelf."[15] The evidence shows only that Newkirk told Adamo that he was going to contact three securities firms that were on Seattle Bank's approved list, one of which was Barclays.[16]

Barclays ignores or glosses over the contrary evidence that creates genuine issues as to material facts about the origin of IND1 and IND2. In its opening brief, Seattle Bank cited evidence that, long before December 2007, Barclays and IndyMac were experienced business partners[17]; that

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[13] Barclays Br. at 9.

[14] Barclays cites only the following interrogatory answer provided by Seattle Bank. "Mr. Adamo and Mr. Newkirk went on a ski trip, during which Mr. Adamo told Mr. Newkirk that he was a buyer of bonds and that he might be able to purchase a security backed with collateral originated by IndyMac, if the security was issued by an approved issuer or dealer." *Id.* at 9-10 n.8, citing CP 565.

[15] Barclays Br. at 11.

[16] CP 7438.

[17] Seattle Bank Op. Br. at 18-19, citing CP 4580–4581, 4593–4599, 4868.

IndyMac proposed on October 11, 2007, by email to Barclays alone, without a mention of Seattle Bank, a transaction essentially the same as what became IND1[18]; and that when IndyMac and Barclays resumed their discussion of that transaction in late December 2007, there was again no mention of Seattle Bank.[19] Barclays says only that "nothing in the record indicates that these documents were at all related to the transactions at issue here."[20] But the chain of emails that Seattle Bank cited in its opening brief proves that IND1 grew directly out of these communications between longtime partners IndyMac and Barclays; Barclays cites nothing that even mentions Seattle Bank until well after December 2007. And Barclays simply ignores its own statement in October 2007 that the "reverse inquiry" that led to IND1 came to it from IndyMac, not Seattle Bank.[21] Thus, Barclays is wrong that it "was brought in later in order to implement the transaction that [Seattle Bank] and IndyMac had already agreed upon."[22]

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[18] *Id.* at 18, citing CP 4845–4846.

[19] *Id.* at 19-20, citing CP 4888, CP 4893.

[20] Barclays Br. at 45 n. 39.

[21] Seattle Bank Op. Br. at 18, citing CP 4845–4846.

[22] Barclays Br. at 45–46.

2. Issues About The Structuring Of, And Selection Of Mortgage Loans To Back, IND1 And IND2

Barclays argues that Seattle Bank "structured the deals and picked specific collateral for them."[23] This argument is directly contradicted by Adamo's testimony that it was Barclays and IndyMac, not Seattle Bank, that structured and chose the collateral for the IND1 and IND2 transactions.[24] Adamo's testimony, standing alone, prevents Barclays from proving that there is no disputed material fact on this issue.

As evidence to the contrary, Barclays cites a list of documents that Seattle Bank provided in response to an interrogatory that asked Seattle Bank to identify "all communications" between Seattle Bank and IndyMac about the potential purchase of a security backed by IndyMac loans.[25] Seattle Bank never claimed that those documents were evidence that Seattle Bank structured or selected mortgage loans for IND1 or IND2, and if even one of those documents actually contained such evidence, Barclays would have identified the document explicitly rather than cited indiscriminately to a list.

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[23] *Id.* at 10 n.8; *see also id.* at 44.

[24] CP 3043–3044.

[25] Barclays Br. at 9–10 n.8; CP 563–565, 568–569.

Barclays also ignores the statement of its transaction manager that it was structuring IND1. "Keith, are we structuring this deal? ... Yes."[26] Barclays also ignores the many communications in which it and IndyMac (with never even a copy to Seattle Bank) went back and forth many times on which mortgage loans to include in IND1 and IND2.[27] Barclays does not dispute that it sent the results of the due diligence examination of those loans only to IndyMac, never to Seattle Bank.[28]

It is true that Newkirk asked, and Adamo answered, numerous questions about various technical features of IND1 and IND2 that would be acceptable to Seattle Bank. But, as noted above, Newkirk and Adamo never discussed the selection of mortgage loans to back those securities. And Seattle Bank has never alleged that Barclays made untrue or misleading statements about any of the technical features that Newkirk and Adamo discussed, only about the credit quality of the mortgage loans that Barclays and IndyMac—but not Seattle Bank—decided to put into those deals.

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[26] Seattle Bank Op. Br. at 20, citing CP 4911.

[27] *Id.* at 20-21; 23-24.

[28] *Id.* at 21, 25.

II. THE REST OF THE EVIDENCE THAT BARCLAYS CITES IS IRRELEVANT TO REASONABLE RELIANCE.

The rest of the evidence that Barclays cites (and often mischaracterizes) is intended to prejudice the Court and distract from the genuine issues of material fact. None of it has anything to do with reasonable reliance. The Court should ignore all of it.

For example, Barclays argues that Seattle Bank knew that Alt-A loans were "riskier than a typical home loan" and "generally have lower FICO scores and may provide a lower level of income documentation."[29] But the relative risk of different types of loans is irrelevant to whether it was reasonable for Seattle Bank to rely on the specific statements that Barclays made in its offering documents about compliance of loans with underwriting guidelines, compliance of appraisals with the Uniform Standards, and the weighted-average loan-to-value ratios of the underlying loans.

Barclays also argues that Seattle Bank continued buying RMBS after some other Federal Home Loan Banks had "stopped buying instruments backed by ALT-A collateral,"[30] that IndyMac "was not an approved issuer/seller of RMBS" to the Seattle Bank,[31] that Adamo was

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[29] Barclays Br. at 19, 20; see also Barclays Br. at 41–42.

[30] Barclays Br. at 14.

[31] *Id.* at 3.

aware of "turmoil in the RMBS market,"[32] and that Seattle Bank made an exception to its policies when it purchased the IND2 certificate.[33]

Any attempt to paint the Seattle Bank as a reckless investor is hopeless. Seattle Bank only bought RMBS that received the highest possible rating of triple-A from the rating agencies.[34] And in most cases, Seattle Bank insisted on far more credit protection than was necessary to obtain a triple-A rating.[35] Very often, Seattle Bank sacrificed yield on its RMBS investments specifically to obtain this extra protection.[36] Moreover, Barclays ignores that public information about alternative-A mortgage loans and the RMBS market was equivocal; indeed, Barclays told its own clients that the level of delinquencies in alternative-A mortgage loans was "not cause for alarm."[37]

But the more salient point, again, is that this evidence simply has nothing to do reasonable reliance. This Court is not being asked to decide whether Seattle Bank's investment strategies were prudent. The only relevant question is whether it was reasonable for Seattle Bank to rely on

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[32] *Id.* at 19.

[33] *Id.* at 4.

[34] CP 3042, 4446-4448.

[35] CP 3402, 4285-4286, 4299, 4301-4303, 4324, 4666.

[36] CP 3402.

[37] Seattle Bank Op. Br. at 16–17, citing CP 4538.

specific statements that Barclays made in its offering materials for IND1 and IND2. Nothing else matters.

III. BARCLAYS GIVES NO PERSUASIVE REASON WHY THE WASHINGTON SUPREME COURT WOULD READ AN ANTI-INVESTOR RELIANCE REQUIREMENT INTO THE WSSA.

Barclays does not come to grips with any of the reasons why the Washington appellate courts should reject its argument that a plaintiff in an action under RCW 21.20.010(2) must prove that it reasonably relied on the defendant's untrue or misleading statements.

A. Whether A Plaintiff Must Prove Reliance Was Not Before The Washington Supreme Court In *Hines v. Data Line Systems, Inc.*, So The Sentence In Its Decision About Reliance Was Dictum.

The Washington Supreme Court first mentioned a reliance requirement in its decision in *Hines v. Data Line Systems, Inc.*[38] in 1990. (Barclays is wrong that the Washington Supreme Court imposed a reliance requirement in *Shermer v. Baker*[39] in 1970.[40] *Shermer* was a decision of Division 2 of the Court of Appeals, not the Washington Supreme Court. It has been cited just once in a published opinion for a requirement to prove

[38] 114 Wn.2d 127 (1990).

[39] 2 Wn. App. 845 (1970).

[40] Barclays Br. at 29 n. 25.

reliance, in another decision of Division 2, which the Supreme Court overruled.[41])

In *Hines*, the investor plaintiffs conceded that they had to prove that they actually relied on the allegedly untrue or misleading statements in deciding to buy shares in Data Line. On appeal, the parties disagreed about whether the investors also had to prove loss causation, that is, that those allegedly untrue or misleading statements caused their shares to become worthless. But the question of reliance was never before either this Court or the Washington Supreme Court.

In the assignments of error in their opening brief to this Court, the investors in *Hines* referred only to loss causation, not to reliance.[42] In their tenth assignment of error, they wrote: "*Causation* . . . Must an injured investor prove that the specific fact or facts omitted from the offering materials directly caused the security to become worthless?"[43] Later in their brief, the investors conceded that they would have to prove that they actually relied on the untrue or misleading statements:

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[41] *Ludwig v. Mut. Real Estate Inv*'rs., 18 Wn. App. 33, 40 (1977), *overruled by Kittilson v. Ford*, 93 Wn.2d 223 (1980).

[42] *See* Brief of Appellants in *Hines* at 2–4, attached as Appendix II to Barclays's Brief.

[43] *Id.* at 4.

> Thus, at the very most, Investors here will have to demonstrate at trial a causal nexus not between Peterson's aneurysms [which were not disclosed in the offering documents] and Data Line's demise, but *between Respondent's failure to disclose material facts and Investors' decision to purchase the stock.*[44]

In the conclusion of their brief, the investors asked this Court to rule that: "Injured investors need not prove 'loss causation,' i.e., that the omitted fact(s) directly caused the security to become worthless."[45] They requested no ruling on reliance. Finally, in their reply brief, the investors acknowledged even more clearly that they were required to prove actual reliance. "Investors contend that they need only show 'transaction causation,' i.e., that the omission was a substantial contributive factor in their decision to purchase the stock."[46] Indeed, Barclays appears to admit that the parties in *Hines* disagreed only about loss causation, not reliance.[47]

Under RAP 12.1(a) ("the appellate court will decide a case only on the basis of issues set forth by the parties in their briefs") and 13.7(b) ("the Supreme Court will review only the questions raised in . . . the petition for

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[44] *Id.* at 62 (emphasis in original).

[45] *Id.* at 66.

[46] Reply Brief of Appellants in *Hines* at 18, attached as Appendix I to Barclays's Brief.

[47] Barclays Br. at 26.

review and the answer"), the question whether a plaintiff in an action under the WSSA must prove reliance was not before either this Court or the Supreme Court.[48] Whatever a court may say about a question that is not before it is dictum. "Statements in a case that do not relate to an issue before the court and are unnecessary to decide the case constitute obiter dictum, and need not be followed."[49] Thus, because the question whether an investor must prove reliance was not before the Washington Supreme Court in *Hines*, its single sentence on that subject was dictum.[50]

B. The Legislature Intended The WSSA To Be Broader Than SEC Rule 10b-5.

Barclays's argument that the Legislature designed the WSSA to be a clone of SEC Rule 10b-5, and thus to require proof of reliance, just wishes away the contrary decisions of the Washington Supreme Court. Barclays does not dispute that the Supreme Court has held repeatedly that the WSSA was modeled on Section 12(a)(2) of the 1933 Act and the

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[48] *See Richmond v. Thompson*, 130 Wn.2d 368, 389 (1996); *Courtright Cattle Co. v. Dolsen Co.*, 94 Wn.2d 645, 658 (1980). *See generally Clark Cty. v. W. Wash. Growth Mgmt. Hearings Review Bd.*, 177 Wn.2d 136, 144–48 (2013).

[49] *In re Domingo*, 155 Wn.2d 356, 366 (2005) (quoting *Malted Mousse, Inc. v. Steinmetz*, 150 Wn.2d 518, 531 (2003)).

[50] Nor was a requirement to prove reliance before the Washington Supreme Court in *Go2Net, Inc. v. Freeyellow.com, Inc.*, 158 Wn.2d 247 (2006), which Barclays also cites. Barclays Br. at 25, 27. The Supreme Court mentioned reliance in its summary of the findings of the jury. But the issue in the case was whether equitable defenses like waiver and estoppel are available to defendants in actions under the WSSA. That has nothing to do with reliance.

Uniform Securities Act, neither of which require proof of reliance, as well as on Rule 10b-5.[51] Never has the Washington Supreme Court held that the WSSA was modeled *only* on Rule 10b-5.

The Washington Supreme Court rejected the "clone of Rule 10b-5" argument in one of its earliest decisions under the WSSA, *Kittilson v. Ford*.[52] The Court noted that Rule 10b-5 was authorized by, and thus could not be broader than, section 10(b) of the Securities Exchange Act of 1934, which prohibits "manipulative and deceptive" conduct in connection with the purchase or sale of a security. The United States Supreme Court had held that the phrase "manipulative and deceptive" "clearly connotes intentional misconduct," so proof of scienter was required in an action under section 10(b) and thus under Rule 10b-5.[53] The Washington Supreme Court drew two critical distinctions between section 10(b) and Rule 10b-5, on the one hand, and the WSSA on the other. "First, the 'manipulative or deceptive' language of section 10(b) of the 1934 act is not included in the Washington act. Secondly, in contrast to the federal

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[51] *See Go2Net,* 158 Wn.2d at 257 (Uniform Securities Act); *Cellular Eng'g, Ltd. v. O'Neill*, 118 Wn.2d 16, 23–24 (1991) (same); *Hoffer v. State*, 113 Wn.2d 148, 151–52 (1989) (section 12(a)(2) of the 1933 Act); *Haberman v. Wash. Pub. Power Supply Sys.*, 109 Wn.2d 107, 125 (1987) (section 12(a)(2) of the 1933 Act and section 410 of the Uniform Securities Act).

[52] 93 Wn.2d 223 (1980).

[53] *Id.* at 225–26 (internal quotation marks omitted).

scheme, the language of Rule 10b-5 is not derivative but is the statute in Washington."[54] For that reason, the Court concluded, the WSSA, unlike Rule 10b-5, does not require proof of scienter.

Kittilson raises a further question, which Seattle Bank discussed at length in its opening brief and which Barclays ignores. When the Legislature enacted the WSSA in 1959, there were (and still are) two separate and distinct remedies for making an untrue or misleading statement in connection with the sale of a security: the strict-liability remedy first created by section 12(a)(2) of the Securities Act of 1933 and the fraud-based remedy first created by section 10(b) of the Securities Exchange Act of 1934. The latter requires plaintiffs to prove elements of common-law fraud (including scienter, reliance, loss, and causation) that the former does not. In *Kittilson*, the Washington Supreme Court considered and rejected the argument that a plaintiff in an action under the WSSA must prove scienter.[55] In *Hines*, that Court reached the same conclusion about loss and causation.[56] In its opening brief, Seattle Bank asked why the Washington Supreme Court would single out reliance as

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[54] *Id.* at 226.

[55] 93 Wn.2d at 225–226.

[56] 114 Wn.2d 127, 134–35 (1990).

the sole common-law requirement to graft on to the otherwise strict-liability remedy in the WSSA. Barclays gives no answer.

Nor can the "clone of Rule 10b-5" argument be squared with the many decisions of the Washington Supreme Court that the Legislature intended the WSSA to protect investors and thus to be broader than federal law, which protects only the securities markets. In *Hoffer*, the Supreme Court wrote that "it is important to note that the WSSA has a different purpose than the federal statute, in that it endeavors to protect investors, not just the integrity of the marketplace. Accordingly, our statute is more broadly construed."[57] If the WSSA were just a clone of Rule 10b-5, then its purpose could not be broader than the purpose of the federal securities laws.

C. Most Other States Reject A Reliance Requirement.

Barclays is right that Illinois, Kansas, and Minnesota require proof of reliance in actions under their counterparts of the WSSA (as do Georgia and North Carolina, which Seattle Bank mentioned in its opening brief). (Barclays is mistaken, however, that Colorado, Indiana, Maryland, Ohio,

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[57] 113 Wn.2d at 152. To the same effect, *see FutureSelect Portfolio Mgmt., Inc. v. Tremont Grp. Holdings, Inc.*, 180 Wn.2d 954, 970-71 (2014); *Kinney v. Cook*, 159 Wn.2d 837, 844 (2007); *Go2net,* 158 Wn.2d at 253; *Cellular Eng'g, Ltd. v. O'Neill*, 118 Wn.2d at 23; *Hines*, 114 Wn.2d at 145; *Haberman*, 109 Wn.2d at 125-26.

and Oregon require proof of reliance.[58]) But the fact remains that 20 states reject a reliance requirement, including nine in which that decision was

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[58] Barclays Br. at 33-34.

Colorado: Barclays relies on *Hosier v. Citigroup Global Mkts., Inc.*, 835 F. Supp. 2d 1098, 1107–08 (D. Colo. 2011). *Hosier* was a petition to confirm an arbitral award, not a securities action. In passing, the court referred to the decision in *Huffman v. Westmoreland Coal Co.*, 205 P.3d 501 (Colo. App. 2009), which in turn relied on *Rosenthal v. Dean Witter Reynolds, Inc.*, 908 P.2d 1095 (Colo. 1995). In its opening brief, Seattle Bank noted that *Rosenthal* is inapplicable for the reasons given in *Fed. Deposit Ins. Corp. as Receiver for United W. Bank, F.S.B. v. Countrywide Fin. Corp.*, Nos. 11–ML–02265–MRP (MANx), 11–CV–10400–MRP (MANx), 2013 WL 49727 (C.D. Cal. Jan. 3, 2013). Barclays ignores that decision.

Indiana: Barclays cites *Perry v. Eastman Kodak Co.*, No. IP 87–1023–C, 1991 WL 629728, at *3, *7 (S.D. Ind. Apr. 22, 1991), in which the court wrote in a single sentence with no citation to authority whatsoever that proof of reliance is required. In decisions that Seattle Bank cited in its opening brief but that Barclays ignores, Indiana courts before and since have held that proof of reliance is not required. *Supernova Sys., Inc. v. Great Am. Broadband, Inc.*, Cause No. 1:10–CV–319, 2012 WL 860408, at *5 (N.D. Ind. Mar. 12, 2012) ("proof of reliance is not an element of a fraud claim under the IUSA"); *Landeen v. PhoneBILLit, Inc.*, 519 F. Supp. 2d 844, 864 (S.D. Ind. 2007) ("[p]roof of reliance is not required"); *Wisconics Eng'g, Inc. v. Fisher*, 466 N.E.2d 745, 759 n.8 (Ind. Ct. App. 1984); *Arnold v. Dirrim*, 398 N.E.2d 426, 435 (Ind. Ct. App. 1979).

Maryland: In 2005, the Maryland Court of Appeals noted that the question of a reliance requirement was undecided in Maryland law. *See Lubin v. Agora, Inc.*, 389 Md.1, 26 n.13 (2005) ("Resolving this issue would require us to consider an underlying question of Maryland securities law: whether investor reliance must be proven in order to establish securities fraud under [the Maryland Securities Act]"). The single-sentence, passing observation of a federal district court the next year certainly did not decide that open question of Maryland law. *See Sherwood Brands, Inc. v. Levie*, No. Civ. RDB 03-1544, 2006 WL 827371, at *20 (D. Md. Mar. 24, 2006) ("It is nonsensical that [defendant] did not know of the alleged falsity of these statements and there is no basis for her to have reasonably relied on [them].").

Ohio: The decision that Barclays relies on construes a provision in the Ohio Revised Code that expressly requires proof of reliance. *See* Ohio Rev. Code § 1707.41(A) (providing remedy "to any person that purchased the security *relying on* the [untrue or misleading] circular") (emphasis added). *See also*

reached by the state supreme court. Leaving aside how to interpret *Hines*, no state supreme court has ever imposed a reliance requirement.[59] As

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In re Nat'l Century Fin. Enters., Inc., Inv. Litig., 905 F. Supp. 2d 814, 827–30 (S.D. Ohio 2012). But other provisions of the Ohio Revised Code that deal with the sale of securities require no proof of reliance. *See* Ohio Rev. Code § 1707.44(B)(4) ("No person shall knowingly make or cause to be made any false representation concerning a material and relevant fact, in any oral statement or in any prospectus, circular, description, application, or written statement, for any of the following purposes: . . . Selling any securities in this state."); Ohio Rev. Code § 1707.44(G) ("No person in purchasing or selling securities shall knowingly engage in any act or practice that is, in this chapter, declared illegal, defined as fraudulent, or prohibited."); *Stuckey v. Online Res. Corp.*, 909 F. Supp. 2d 912, 938 (S.D. Ohio 2012); *Murphy v. Stargate Def. Sys. Corp.*, 498 F.3d 386, 392 (6th Cir. 2007).

Oregon: *See* fn. 59 below.

[59] Like the WSSA in RCW 21.20.010, Oregon law makes it unlawful to make any untrue or misleading statement of a material fact in connection with the purchase or sale of a security. ORS § 59.135. Also like the WSSA in RCW 21.20.430, Oregon law makes a person who sells a security by means of an untrue or misleading statement liable to the person who purchased it. ORS § 59.115. The plaintiff in an action under ORS § 59.115 need not prove that it relied on the untrue or misleading statement in deciding to purchase the security. *Everts v. Holtmann*, 64 Or. App. 145, 152 (1983) ("ORS 59.115(1)(b) imposes liability without regard to whether the buyer relies on the omission or misrepresentation.").

In 2003, the Oregon Legislative Assembly added a second remedy for making an untrue or misleading statement, which has no counterpart in Washington law. Under ORS § 59.137, a purchaser of a security may sue anyone who makes an untrue or misleading statement about that security, *even if that person did not sell the security to the plaintiff*. In *State v. Marsh & McLennan Cos., Inc.*, 353 Or. 1 (2012), for example, a company whose stock was publicly traded allegedly made untrue or misleading statements about its business. When the truth was revealed, the price of the stock dropped by 37%. The plaintiff, which owned shares of the stock, sued the company, even though it had purchased its shares not from the company but on the open market.

ORS § 59.137(1) limits a plaintiff's recovery to "the actual damages caused by the violation." In *Marsh*, the Oregon Supreme Court held that a plaintiff in an action under ORS § 59.137 must prove that it relied on the allegedly untrue or misleading statement in purchasing the security. 353 Or. 1, 10–11. But the court left undisturbed the decision in *Everts* that a plaintiff in an action under

required by RCW 21.20.900, the Washington Supreme Court interprets the WSSA to make it uniform with the law of other states that have adopted similar statutes. And, as noted above, that Court always interprets the WSSA to protect investors. Nothing in its many decisions under the WSSA suggests that the Washington Supreme Court would ally Washington with the anti-investor decisions of lower courts in a small minority of other states.[60]

ORS § 59.115 (Oregon's counterpart to RCW 21.20.430) is not required to prove reliance. *Id.*

[60] Barclays also raises various legal issues unrelated to reliance, all of which the trial court below decided correctly in favor of Seattle Bank, and none of which are on appeal. For example, Barclays tries to prejudice the Court by arguing that Seattle Bank received "every penny" that it was entitled to under its investments. Barclays Br. at 6. Barclays ignores the fluctuation in market value of the securities, but in any case, as the trial court correctly held "[e]vidence about loss causation . . . is not relevant to any viable claim or defense." SCP __. *See also Go2Net*, 158 Wn.2d at 253; *Hines*, 114 Wn.2d at 135. Barclays also argues that Seattle Bank "had never seen a full copy of any of the underwriting guidelines applicable to any of those loans," (Barclays Br. at 42) and that the Seattle Bank "cannot even demonstrate that the prospectus supplements contained material misstatements about [weighted-average loan-to-value ratios]." (Barclays Br. at 40 n. 32). But the trial court rejected both of these arguments, holding that there were genuine issues of material fact about whether there was a material discrepancy "between the disclosed and actual weighted loan to value ratios" and whether it was reasonable for Seattle Bank to "rely on statements in the prospectus supplements that loans 'complied with underwriting guidelines', without hav[ing] the actual underwriting guidelines set out in the [offering materials]." SCP __. Barclays gives this Court no reason to supplant the findings of the trial court on these issues.

Dated: May 19, 2017.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this date, I caused a copy of the foregoing **Appellant's Reply Brief** to be served *via email* upon the attorneys of record listed below:

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I hereby certify, under penalty of perjury under the laws of the State of Washington, that the foregoing is true and correct.

Dated: May 19, 2017 at Seattle, Washington.

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